(2)

No. 84-973

Office-Supreme Court, U.S.
FILED
JAN 15 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

EMIL ROTHENBERGER, on behalf of himself and all others similarly situated,

Petitioners,

v.

DOUGLAS COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

DAVID L. WEINSTEIN
KARON, MORRISON & SAVIKAS, LTD.
5720 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-6000
Attorney for Respondent

Of Counsel:
JAMES W. OLSON
P.O. Box 157
Armour, South Dakota 57313
(605) 724-2805

JOHN W. MORRISON
KARON, MORRISON & SAVIKAS, LTD.
5720 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-6000

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTION PRESENTED

Should this Court grant certiorari when the decision of the Court of Appeals for the Eighth Circuit is supported by clear precedent under the Age Discrimination in Employment Act, and principles of due process of law?

RULE 28.1 DECLARATION

No Rule 28.1 Declaration is necessary because under South Dakota law, Respondent Douglas County is a public agency and political subdivision of the State of South Dakota, and not a corporation.

TABLE OF CONTENTS

	PAGE
Opinions And Judgments Delivered Below	1
Statement Of The Case	2
A. Nature of Petitioners' Complaint	2
B. Statement of Facts	2
C. Proceedings Below	3
Argument In Opposition To Petition	5
A. The Decisions Below Were Correctly Decided, and Do Not Conflict With Precedents Concerning Viable Claims Under the ADEA and Due Process	5
B. The Decisions Below Correctly Found That on the Particular Facts Alleged in This Case, Tolling of the Limitation Period Under the ADEA Was Inappropriate, as a Matter of Law	7
Conclusion	9

TABLE OF AUTHORITIES

Cases

PAGE

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 6, 7

Board of Regents v. Roth, 408 U.S. 564 (1971) 6

Cova v. Coca-Cola Bottling Co. of St. Louis, 574 F.2d 958 (8th Cir. 1978) 5

Delaware State College v. Ricks, 449 U.S. 250 (1980) .. 8

Kazanzas v. Walt Disney, 704 F.2d 1527 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 425 (1983) 8

Ott v. Midland-Ross Corp., 600 F.2d 24 (6th Cir. 1979) 7

Perry v. Sindermann, 408 U.S. 593 (1972) 6

Rothenberger v. Douglas County, 586 F.Supp. 210 (D. S.D. 1983), *affirmed*, 736 F.2d 1240 (8th Cir. 1984) 1

Steelworkers v. Weber, 443 U.S. 193 (1979) 5

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 5

Wilkerson v. Siegfried Insurance Agency, 683 F.2d 344 (10th Cir. 1982) 7

Statutes

29 U.S.C. §§621 *et seq.* 2

29 U.S.C. §626(d) 4

29 U.S.C. §626(d)(1) 3, 7, 8

In the
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-973

EMIL ROTHENBERGER, on behalf of himself and all others similarly situated,

Petitioners,

v.

DOUGLAS COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS DELIVERED BELOW

The order of the Court of Appeals for the Eighth Circuit is officially reported at 736 F.2d 1240 (8th Cir. 1984). The Eighth Circuit affirmed the opinion and decision of the District Court for the District of South Dakota, Southern Division, dismissing with prejudice Petitioners' Complaint. The District Court's opinion is officially reported at 586 F.Supp. 210 (D. S.D. 1983).[1] The order of the Court of Appeals for the Eighth Circuit denying rehearing is not officially reported.

[1] Those orders and opinions are reprinted in the Appendix to Petition for Certiorari. References to that Appendix in this brief shall be "App. ____."

STATEMENT OF THE CASE

A. Nature Of Petitioners' Complaint

Petitioners sued Respondent Douglas County, alleging that Respondent's failure to participate in the South Dakota State Retirement System ("retirement system") violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621 *et seq.*, the due process clause and unspecified state law. (736 F.2d at 1241; App. 2).

B. Statement Of Facts

Respondent Douglas County is a small county in South Dakota which employs a total of approximately 75 persons, including certain publicly elected officials. Under South Dakota law, the state retirement system is the only retirement or pension system in which governmental entities such as Douglas County can participate. (586 F.Supp. 210; App. 5). As established by Respondent's affidavits submitted to the District Court, Douglas County did not participate in the state retirement system or provide retirement benefits of any kind to any of its employees until July 1, 1983.

Douglas County's initial decision not to participate in the state retirement system was made some nine years earlier, at a public meeting of Respondent's governing body on or about May 23, 1974. (586 F.Supp. 210; App. 5). One member of Petitioners' alleged class attended this May, 1974 meeting and at that time learned of Douglas County's decision not to participate in the state retirement system.

Over seven years after Douglas County's May, 1974 declination to join the retirement system, in September, 1982, Petitioners concluded that Respondent's decision not to participate in the state retirement system in 1974 purportedly had been motivated by Douglas County's

alleged "policy" of age discrimination against Petitioners. On December 21, 1982, one of the Petitioners filed an administrative charge with the Equal Employment Opportunity Commission ("EEOC"), alleging age discrimination in employment by Douglas County against Petitioners based on Respondent's failure to provide pension benefits to Petitioners during the period since July, 1974. (586 F.Supp. at 210-211; App. 5). The EEOC subsequently determined that the charge was without merit.

C. Proceedings Below

In June, 1983, Petitioners filed their complaint in the District Court, alleging primarily that Douglas County had violated the ADEA and due process through the purportedly disparate impact upon older employers of Respondent's declination to participate in the state retirement system in 1974. Douglas County thereafter moved to dismiss Petitioners' complaint on the grounds that Petitioners' administrative charge of age discrimination had not been filed with the EEOC within the 180 day limitation period prescribed by 29 U.S.C. §626(d)(1), and the complaint failed to state a cause of action under the ADEA. (586 F.Supp. at 210-211; App. 5). In connection with this motion, the parties each filed certain affidavits and exhibits extraneous to Petitioners' pleading.

On December 19, 1983, the District Court granted Douglas County's motion and dismissed Petitioners' complaint with prejudice. In doing so, the District Court reasoned that Petitioners'

> Counsel has cited no authority for the proposition that the failure to adopt a pension plan constitutes a violation of ADEA, and I haven't found any such authority. I conclude therefrom that the defendant had no obligation under ADEA to adopt a pension plan for its employees. (586 F.Supp. at 211; App. 5).

In addition, the District Court found that Petitioners' EEOC charge had been untimely filed under the 180 day limitation period required by 29 U.S.C. §626(d). In this regard, the District Court determined that there was

> no basis herein for any equitable tolling of the limitation period. The plaintiff clearly knew or should have known that Douglas County did not join the state plan in 1974, and any reason or motive behind such failure to join the plan would not toll the statute. (586 F.Supp. at 211; App. 5-6).

With respect to Petitioners' due process claim, the District Court held "that the failure of the defendant to adopt a pension plan does not give rise to a due process claim, as a matter of law." (586 F.Supp. at 211; App. 6).

Petitioners did not seek reconsideration of the District Court's ruling nor did Petitioners seek leave to vacate the District Court's dismissal of the complaint and file an amended complaint. Petitioners did subsequently appeal to the Eighth Circuit the District Court's dismissal of Petitioners' ADEA and due process claims.

Following the submission of briefs by the parties and oral argument, the Eighth Circuit Court of Appeals affirmed, based on both the District Court's decision, and the absence therein of any "error of law or fact." (736 F.2d at 1241; App. 2).

ARGUMENT IN OPPOSITION TO PETITION

A The Decisions Below Were Correctly Decided, and Do Not Conflict With Precedents Concerning Viable Claims Under the ADEA and Due Process.

A review of the decisions of the two courts below, rejecting Petitioners' contention that Douglas County's declination to join the state retirement system in 1974 violated the ADEA and due process, demonstrates no conflict with applicable precedents concerning viable claims under the ADEA and due process. Thus, there is no basis for this Court's grant of the petition.

This Court has found that equal employment statutes such as Title VII are not intended to "diminish traditional management prerogatives", *Steelworkers* v. *Weber*, 443 U.S. 193, 207 (1979), or require "that an employer give preferential treatment" to persons protected by the law. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 260 (1981). With respect to the ADEA, lower courts have similarly determined that the Act does not oblige an employer to provide older employees with more favorable employment terms, conditions or benefits than those afforded to younger workers. See, e.g., *Cova* v. *Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 960 (8th Cir. 1978).

Until July, 1983, when Douglas County joined the state retirement system, Respondent did not provide any pension or retirement benefits to any of its employees. Accordingly, Douglas County's declination to participate in the retirement system in 1974 resulted in the same absence of pension benefits for both younger and older workers. Thus, no County employee received any greater or lesser pension

benefits than any other through Respondent's failure to join the state retirement system in 1974. In view of the absence of any disparity in the pension benefits afforded by Douglas County, the courts below correctly found that Respondent's declination to participate in the retirement system in 1974 does not constitute a violation of the ADEA.

The courts below were similarly correct, and in accord with precedent, in rejecting Petitioners' contention that Douglas County's failure to join the retirement system in 1974 violated due process. This Court has determined that in order to invoke the protection of the due process clause, a person must possess a constitutionally protected property or liberty interest. *Board of Regents* v. *Roth*, 408 U.S. 564, 572, 576-578 (1971). With respect to public employment, such a protected interest must arise from a mutually recognized entitlement, as opposed to a unilateral expectation of a benefit. See *Perry* v. *Sindermann*, 408 U.S. 593, 601-602 (1972).

Nothing in South Dakota law provides Petitioners with any unconditional right to pension benefits. In addition, until Douglas County began participating in the state retirement system in 1983, neither Petitioners nor any other County employees had any right, entitlement or mutually recognized expectation of receiving pension benefits. The absence of any such right, entitlement or expectation amply supports, and indeed requires, the lower court's finding that Douglas County's failure to join the retirement system in 1974 does not give rise to a due process claim, as a matter of law.

Petitioners suggest that *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073 (1983), raises the issue of whether Douglas County's declination to participate in the state retirement system in 1974 violates Petitioners' rights under the ADEA and due process. *Norris* holds that Title VII

requires an employer who provides retirement benefits to its employees to calculate such benefits without regard to the sex of the beneficiary. *Id.* at U.S. 1073, ———, 103 S.Ct. 3492, 3493. However, nothing in *Norris* indicates or implies that the ADEA or due process obliges an employer such as Douglas County to institute a pension plan or to have furnished any pension benefits to its workers in 1974.

The District Court recognized that there is no precedent or other authority for Petitioners' novel theory that Douglas County's decision not to provide any of its employees with retirement benefits violates the ADEA or due process. In addition, existing precedents thoroughly establish that because Douglas County's failure to join the state retirement system in 1974 did not deprive older employees of pension benefits provided to younger workers, Respondent's declination to afford retirement benefits to older workers did not violate the ADEA or due process. Thus, the unassailable decisions below simply do not merit review by this Court.

B. The Decisions Below Correctly Found That on the Particular Facts Alleged in This Case, Tolling of the Limitation Period Under the ADEA Was Inappropriate, as a Matter of Law.

Petitioners contend that the decisions below conflict with precedents ruling that under certain circumstances, equitable tolling of the 180 day limitation period prescribed by 29 U.S.C. §626(d)(1) is appropriate. In support of this contention, Petitioners rely on decisions generally ruling that where an employer affirmatively misrepresents its decision to discharge an employee, tolling may be appropriate. See, e.g., *Ott* v. *Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979), and *Wilkerson* v. *Siegfried Insurance Agency*, 683 F.2d 344 (10th Cir. 1982).

Unlike the foregoing precedents, in this case neither Petitioners' complaint nor the affidavits Petitioners submitted to the District Court contain any allegation that Douglas County had affirmatively misrepresented its 1974 declination to join the state retirement system. In addition, in Petitioners' complaint and affidavits, Petitioners admit that in May, 1974, they learned of Douglas County's decision not to participate in the retirement system. However, Petitioners did not file their EEOC charge until December, 1982, more than seven years after May, 1974. Under these circumstances, the courts below correctly found that, as a matter of law, Petitioners' EEOC charge was untimely. See *Delaware State College* v. *Ricks*, 449 U.S. 250, 258 (1980).

In view of Petitioners' knowledge of Douglas County's declination to join the retirement system in 1974, together with Petitioners' failure to allege any sound reasons for tolling of the 180 day limitation period under 29 U.S.C. §626(d)(1), and the absence of any viable ADEA claim in the first instance, the courts below properly determined that on the particular facts alleged in this case, tolling was inappropriate, as a matter of law.[2]

---

[2] Notwithstanding Petitioners' knowledge of Douglas County's failure to join the state retirement system in 1974, Petitioners contend that tolling is appropriate based solely upon Respondent's purported failure to display a poster informing Petitioners of the 180 day limitation period under the ADEA. However, in light of Petitioners' long-standing knowledge of Douglas County's supposed wrongdoing, the purported absence of such a poster cannot justify equitable tolling throughout the more than seven years Petitioners delayed in filing their EEOC charge. See *Kazanzas* v. *Walt Disney*, 704 F.2d 1527, 1530-31 (11th Cir. 1983), *cert. denied*, ——— U.S. ———, 104 S.Ct. 425 (1983).

CONCLUSION

The petition fails to identify any conflict between the decisions below and applicable precedents of this Court or other courts under the ADEA and principles of due process of law. The law is clear, well-established and was correctly applied to the particular facts of this case.

It is therefore respectfully submitted that the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

David L. Weinstein
Karon, Morrison & Savikas, Ltd.
5720 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-6000
Attorney for Respondent

Of Counsel:

James W. Olson
P.O. Box 157
Armour, South Dakota 57313
(605) 724-2805

John W. Morrison
Karon, Morrison & Savikas, Ltd.
5720 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-6000